a false representation will entitle him who uses it to his injury to recover from the original seller.[14] The question of knowledge of its use, however, when the oil is used in a manner which everyone knows is dangerous even when pure, brings little order out of chaos. The question is simply, is the article fit for the particular purpose for which it is paraded on the market.[15]

We shall not dilate upon the problems of proximate cause, which is prolix in its ramifications. The question is briefly whether the interjection of a human agency, the intermediate, seller, is a break in the chain of concentration which will relieve the original vendor. There is a line of cases represented by *Fowles* v. *Briggs*,[16] which say that where there is the intervention of a human agency upon whom rests the obligation of inspection, the chain is broken. Those cases do not arise from a situation where there are a series of events resulting from the placing of an article on the market for resale. When an article or machine is sent out to be passed on by resale, or when it is furnished under contract to be used by another's servants, an injury, resulting from the only use for which it was intended, would seem to be the result of a chain of events so natural as to form one whole and to be the natural and probable consequence of the defendant's act.[17]

The principal case, while not so clear as one might desire on the question of knowledge of the defect in the article sold, at least in the dictum of the courts, places the law where it ought to be and removes much of the confusion which has resulted in making arbitrary distinctions between articles as to which are and which are not inherently dangerous.[18]

Undue Preference Under the English Railway Acts.

In *Holwell Iron Co.* v. *Midland Ry.*,[1] the plaintiff claimed that the defendant company had granted undue preference to three rival companies, each in different localities. As to the first, the defendant did all the terminal service and provided

[14] *Levy* v. *Langridge*, 4 M. & W. 337 (1838).

[15] *Watson* v. *Augusta Brewing Co.*, I L. R. A. 1178 (Ga. 1905).

[16] 116 Mich. 425 (1898).

[17] *Haverly* v. *State Line R. Co.*, 135 Pa. 50.

[18] *Huset* v. *Case Threshing Machine Co.*, 120 Fed. 865 (1903).

[1] L. R. 1 K. B. (1909) 486.

all terminal accommodations free of charge and granted lower rates for siding and main line work. This they justified as part consideration for the conveyance of certain private railways and sidings. As to the second, the defendant allowed certain rebates for hauling their traffic over their intervening sidings to and from the defendant's railway. These traders had better facilities with rival railways and secured the rebates because of competition. Such rebates were not in excess of reasonable remuneration for the services performed. As to the third, rebates were allowed in respect of services performed by them at their private sidings.

The Court held that such agreements, as in the first case, must be viewed with great suspicion, but it cannot be held as a matter of law that the payment for railway services or accommodation must take the form of coin of the realm. Since this agreement of purchase explains and accounts for the inequality of rates and is a fair and honest bargain, and since the consideration has been duly conveyed to and is enjoyed by the railway company, it is impossible to say that it is also an undue preference.

Where the reduced rate is due to competition and is not a pure and simple gift,[2] but a reasonable remuneration[3] for the services performed in hauling his traffic over his intervening private sidings to and from the railway, it is justified. As to the third, recovery was barred by the statute[4] which limits the bringing of action to one year after knowledge of the undue preference.

The English law, as relating to carriers, differs in several important respects from the American acts. The Act of 1854[5] enacts that no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person, company or traffic, or subject the same to any undue or unreasonable prejudice or disadvantage whatsoever.

Under the statute it is held the act complained of must be undue, unreasonable, or unfair in the company's treatment of the parties under investigation relatively to one another. A mere inequality in charge raises a presumption[6] that it is undue, unreasonable, or unfair, but it may be rebutted by a

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[2] *Phipps* v. *L. & N. W.*, 8 Ry. & Ca. Tr. Cas. 83 (1892) 2 Q. B. 229.

[3] *Hickelton* v. *Dock Co.*, 12 Ry. & Ca. Tr. Cas. 63 (1903).

[4] Act 1888 (51 and 52 Vict. c. 25), sec. 12.

[5] 17 and 18 Vict. c. 31, sec. 2.

[6] *Denaby* v. *Manchester*, 3 Ry. & Ca. Tr. Cas. 426, 441 (1880).

bona fide effort to regulate[7] the traffic, a reasonable compensation[8] for services rendered, an increased length of haul,[9] or a reasonable[10] relation to the economy effected, as in the increase or decrease of the average cost of working. While the mere existence of competition is not any justification[11] for a difference in rates or rebates, it cannot be said as a matter of law[12] to be a consideration which may not be considered by the Commission or the courts, but it is one of the facts entering into the reasonableness of the rate.

Under the English Act of 1888,[13] the carrier must first submit its agreements or changes of rates to the Commission. Under the Act of 1873[14] this Commission was composed of three persons, one experienced in the law and another in railway business. By the Act of 1889[15] a Judge of the High Court was appointed to preside at the sittings of the Commission, which was then declared a Court of Record, not liable to be restrained by prohibition, injunction, *certiorari* or otherwise. The Commission is authorized[16] to take into consideration the interests of the public, but shall not sanction or allow any difference in the tolls, rates or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services.

The Equality Clause of 1845[17] required equality of rates for transportation "over the same portion of the line of railway under the same circumstances." While the McCullom Act[18] was modeled upon the prior English acts, the phraseology was so changed, the economic conditions are so different and the methods of railway management are so dissimilar to those in England that the English cases may be used only with great caution. However, the reasoning of the English cases has been

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[7] *Oxlade* v. *N. E. R.* (1864), 1 Ry. & Ca. Tr. Cas. 162.
[8] *M. S. & L. R.* v. *Denaby*, 4 Ry. & Ca. Tr. Cas. 438 (1884).
[9] *Merry* v. *G. S. & W. R.* (1884), 4 Ry. & Ca. Tr. Cas. 383.
[10] *Bellsdyke Co.* v. *N. B. R.* (1875), 2 Ry. & Ca. Tr. Cas. 105.
[11] *Liverpool Assn.* v. *L. & N. W. R.* (1890), 7 Ry. & Ca. Tr. Cas. 126.
[12] *Phipps* v. *L. & N. W., supra.*
[13] *Supra.*
[14] 36 and 37 Vict. c. 48.
[15] 52 and 53 Vict. c. 57.
[16] Act 1888 (51 and 52 Vict. c. 25), sec. 27, p. 2.
[17] Act 1845 (8 Vict. c. 20), sec. 90.
[18] 24 Stat. at L. 379; 34 Stat. at L. 584; 35 Stat. at L. 60.

adopted by our Federal Courts [19] and the same results have been reached in the decisions where the economic conditions are similar.

Thus it has been held by a number of State courts that concessions may [20] be made to secure competitive business, even if discrimination is involved, though the better and prevalent [21] rule is *contra*. Cartage may be accesorial service furnished free to some and denied to others.[22] Competition may lawfully be considered where it is not the only element of difference between the shippers.[23] So, as in the principal case, a rebate may lawfully be allowed as consideration for a contract,[24] or as remuneration for services,[25] or a difference in the method of shipment.[26] Some doubt is cast upon the ability of the carrier to purchase property in consideration of prospective freight rates [27] and the payment for transportation in anything other than currency.

Contracts Impossible of Performance.

The facts that make an agreement impossible of performance may have existed (1) at the time the contract was made, or (2) they may have arisen subsequent to the formation of the contract, but before its performance.

An example of the first class arises where a certain cargo of goods, supposed to be at sea, is bought, and at the time of

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[19] *Interstate Com.* v. *Louisville R. R.*, 73 Fed. 409 (1896); *Tex. & Pac. R. R.* v. *Interestate C.*, 162 U. S. 197, 222 (1896); *Interstate Com.* v. *B. & O. R. R.*, 145 U. S. 263 (1892).

[20] *Johnson* v. *R. R.*, 16 Fla. 623; 26 Amer. Rep. 731 (1878); *Lough* v. *Outerbridge*, 143 N. Y. 271; 42 Amer. St. Rep. 712 (1894).

[21] *Wight* v. *U. S.*, 167 U. S. 512 (1897); *Messenger* v. *P. R. R.*, 36 N. J. L. 407; 37 N. J. L. 531 (1874).

[22] *I. C. C. v. Detroit R. R.*, 167 U. S. 633 (1897); 4 Elliot on Railroads, sec. 1678.

[23] *I. C. C.* v. *Ala. Midland*, 168 U. S. 144 (1897); *Louisville R. R.* v. *Behlmer*, 175 U. S. 648 (1900); *East. Tenn. R. R.* v. *I. C. C.*, 181 U. S. 1 (1901).

[24] *Root* v. *Long Island R. R.*, 4 L. R. A. 331 (1889).

[25] *Chicago & Alton R. R.* v. *U. S.*, 156 Fed. 558 (1907).

[26] *Penn. Ref. Co.* v. *R. R.*, 208 U. S. 208 (1908).

[27] *Weleetka Co.* v. *Fort Smith R. R.*, 12 I. C. C. Rep. 503 (1907). See Drinker's The Interstate Commerce Act, chap. x to xix.